Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

ESTHER BEIN AND WILLIAM BEIN
Petitioners

v.

UNITED STATES OF AMERICA

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

ESTHER BEIN and
WILLIAM BEIN
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7PP

Questions Presented For Review

1. What is the extent of the sovereign immunity of the United States as it pertains to the property rights of the individual protected by the 'due process' clause of the Constitution and specifically the extent of the civil equitable powers of a Federal District Court to compensate an individual for destroyed property in direct contravention of court order and Federal Rule of Criminal Procedure 41(e).

2. That in the event that sovereign immunity may not be waived, and that a Federal District Court may not compensate an individual for destroyed property in contravention of court order and Federal Rule of Criminal Procedure 41(e), that monies ordered forfeit from that individual be offset by any damage to that individual as an equitable remedy.

On July 7th, 1999, the United States District Court for the Western District of Pennsylvania ruled on petitioners Motion for Return of Seized Property in Criminal No. 94-214. A Motion to Amend and/or Alter Judgment pursuant to F. R. C. P. 59(e) was denied on August 18, 1999. Appeal was taken and *United States v. Esther Bein and William Bein*(2000), 214 F. 3d 408 affirmed the August 18, 1999 decision of the District Court. On July 19, 2000, petitioners herein petitioned for rehearing or/and suggestion for *en banc* rehearing. The court issued a certified copy in lieu of a mandate on December 13, 2000. All of these orders are included in the Appendix herein and it is from the certified judgment of December 13, 2000 that this petition is filed.

US Code: Title 28, Section 1254 confers jurisdiction to the Supreme Court to review the appellate decision, and a copy of Fed R. Crim. P. 41(e) is included in the Appendix herein.

The petitioners declare under penalty of perjury that the herein writ of certiorari has been served on the Solicitor General of the United States pursuant to Rule.

This matter concerns the appeal by petitioners from an order of the district court entered August 18, 1999, denying their motion to amend or alter an order entered July 9, 1999, denying in part their motion pursuant to Rule 41 (e) of the Federal Rules of Criminal Procedure for return of property. The petitioners, after the Government wrongfully had destroyed and failed to return their property, filed their Rule 41 (e) motion for the return of the property or compensatory damages. The district court granted the motion in part, awarding money damages, and ordered the Government to return the property it still had in its possession. The court, however, denied the petitioners' motion with respect to their claim for losses of additional property. The petitioners appealed, seeking additional damages.

The Government did not appeal, but asserted that the court did not have jurisdiction to entertain the petitioners' motion for compensatory damages because of sovereign immunity. The appellate court agreed and remanded the case to the district court to further deny the petitioners the monies previously ordered. In its opinion, the appellate court made reference to the fact that the third district had previously never made a definitive ruling on the point and analyzed the issue. The court itself made reference to the fact that the district court had reason to believe that it could award damages under Rule 41(e) and cited *United States v. Martinson*, 809 F. 2d 1364 (9th Cir. 1987); *United States v. Kanasco, Ltd.* 123 F.3d 209 (4th Cir. 1997); and *Mora v. United States,* 955 F. 2d 156 (2d Cir. 1992), that suggested such an approach. It further lists the circuits that do not waive sovereign immunity.

There is no question that the courts are very divided on this important issue. The appellate court relied on the reasoning of *Pena v. United States,* 157 F. 3d 984 (5th Cir. 1998) which relies on *Lane v. Pena,* 518 U.S. 187 (1996) and *United States v. Nordic Village, Inc.,* 503 U. S. 30 (1992), and on the independent reasoning of *Department of the Army v. Blue Fox, Inc.,* 525 U. S. 255 (1999). Petitioners respond that the Supreme Court decisions are very specific. *Nordic* states in its very last sentence that "(S)ince Congress has not empowered a bankruptcy court to order a recovery of money from the United States, the judgment of the Court of Appeals must be reversed. Congress has given express rights to district courts to render payment. See generally US Code Title 28, Section 2414 (Appendix).

Lane may also be differentiated because it relies on an Act which has multiple provisions that separated relief. It relied on a reasoning that "(T)his is not a case which a right of action exists to enforce a federal right and Congress is silent on

the question of remedies." In the instant matter, Congress is silent on the question of remedies. *Blue Fox* deals with substituted relief of a lien. The fact is that money is the end all-be all of such an action. Petitioners state that at all times they would rather have the property back. Indeed, petitioners have always stated that the property still exists. The cart was 'found' even though the Government stated that it had been destroyed. The only testimony edifying destruction was made by a witness who was a stipulated perjurer and the only documentation edifying destruction is a document stipulated to be false. Indeed, the prosecutor suborned the testimony of the perjured witness because nobody knew where the property was. Factually, the court did determine that the property was allegedly destroyed just three weeks after the court ordered the return of the items. *Martinson's* fears have come to light and the Government seeks to add the insult of, we don't have to return things that are court ordered, or statute indicated, rather we may just say the items are gone and go on scot free.

This is definitely a constitutional issue of paramount importance. The fact that the courts seem to be evenly divided demonstrates the ambiguity of a common understanding of the law.

Though, petitioners believe that sovereign immunity may be waived in this matter, in the event that this Honorable Court dictates that such does apply, petitioners would state that equity would still demand a return of some of the monies ordered forfeit by the District Court. It is respectfully submitted that the appellate court failed to consider the fact that monies were paid as and for a fine and / or forfeiture to the district court by the petitioners. The district court ordered the payment of $150,000.00 at the same time that it ordered the Government to return petitioners' property. The forfeiture/fine was to be paid within six months of the verdict. If the property

would have existed at the time the payment became due, and if the payment were not forthcoming, there is no question that the Government would be entitled to attach the said property. Any funds reached by said attachment would inevitably reduce the sum that would have been owed by the petitioners. The converse must equitably exist.

The Government by destroying the property, in direct contravention of a legal court order, and mandated rule, has defacto attached said property for its own use. There is no evidence whatsoever as to how the property was destroyed or even if it was destroyed, except for the stipulated perjured testimony of a police detective, and the stipulated false log that he had fabricated.

There thus has been created a 'fund' by which the Government may return monies to the petitioners. Even if it is decided that sovereign immunity does exist, in the instant matter, monies exist to equitably recompense petitioners for their loss. It would not be an award of monetary damages, rather the return of an overpayment. This would necessitate a determination of loss suffered by petitioners and would put an upper bound on any return. This is especially equitable, since the property was allegedly destroyed in April of 1996, and the monies were paid by Appellants in November of 1996. The Government had a duty to inform the district court that it had destroyed the property before the forfeited money was to be paid. This is especially true considering the stipulation that the Government was informed that something 'fishy' had occurred in August - September of 1996. Since the appellate court did not adjudge the merits as were required, this avenue too was denied petitioners. In the event it is decided that the burden was upon the Government to disprove the petitioners' claims, and there is sovereign immunity, then in that event the appellate court still had to determine a loss sustained by

petitioners.

Petitioners express a belief that the appellate decision is contrary to the decision of other Circuits as stated in the court's own decision, and that consideration by this Honorable Court is necessary to secure and maintain uniformity of decisions, and that this petition involves questions of exceptional importance, to-wit, the extent of the sovereign immunity of the United States as it pertains to the property rights of the individual protected by the 'due process' clause of the Constitution.

Respectfully submitted,
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APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

-vs-

WILLIAM BEIN and EASTER BEIN, } **Criminal No. 94-214**

Defendants.

AMBROSE, District Judge.

FINDINGS OF FACT
CONCLUSIONS OF LAW
and
ORDER OF COURT

FINDINGS OF FACT

1. On October 3, 1994, Defendants William and Esther Bein ("the Beins") were arrested by agents of the Federal Bureau Of Investigation ("FBI"), on warrants issued in connection with an indictment charging them with conspiracy and interstate transportation of stolen property.

2. Following the filing of a superseding indictment, the Beins pled guilty to conspiracy to commit interstate transportation of stolen property and conspiracy to launder money. In Conjunction with the plea, the Beins agreed to cooperate with the Government in the prosecution of other individuals.

3. The current dispute arises from the execution of search warrants at the Beins' residence and warehouse on the date of the arrest. Specifically, the Beins contend that certain items were seized and improperly destroyed.

4. At the sentencing hearing, this Court directed the Government to return all noncontraband items. The Beins were apparently

unsatisfied with the Government's response and eventually filed the pending Motion for return of Seized Property (Docket No. 74).

5. This Court held evidentiary hearings on September 14, 1998, October 29, 1998, February 24, 1999 and April 16, 1999 regarding the seizure and destruction of the Beins' property.

(A) *Execution of the Search Warrants*

6. FBI and IRS agents, aided by a number of police officers from the Interstate Theft Task Force who were deputized as United States Marshals, executed the search warrants issued in conjunction with Operation "Fence Fry."

7. Of the seven to eight search warrants issued, only three pertained to the Beins.

8. Three of the agents involved in the arrests and execution of the warrants, Agent Millar of the FBI, Agent Haefner of the IRS, and Detective Conn of the Pittsburgh Police, testified at the hearings.

9. Detective Conn testified that he arrived at the Beins' residence and arrested Mrs. Bein. He searched her purse for a weapon, removed a few items such as business cards and telephone numbers, and then returned it to her.

10. Conn detained Mrs. Bein at the residence for a short period of time and then took her to the warehouse. Upon arrival, he used one of Mrs. Bein's keys to gain access.

11. Conn remained at the warehouse for approximately 2½ hours and aided in the seizure of health and beauty aids, and of shipping documents, bills of lading, and other business records.

12. Agent Haefner testified that she too participated in the execution of the search warrants, and that she was present at the Beins' residence for a short period of time.

13. Agent Millar coordinated the execution of the warrants and of the arrests.

14. Government Exhibit 5 lists the items seized from the residence and Exhibit A to the Motion for Return of Seized Items lists the items seized from the warehouse.

(B) *Transportation of Seized Items*

15. Agents transported the goods from Cleveland, Ohio to Pittsburgh, Pennsylvania. The goods (health and beauty aids) were placed in a forfeiture lot maintained by the Pittsburgh Police Department.

16. Agent Millar testified that all of the documents seized pursuant to the search warrants, were tendered to Agent Haefner and were stored with the IRS.

(C) *Return of the Seized Items*

17. Conn testified that a portion of the seized items were returned during pretrial preparation. Specifically, Conn explained that certain items which were determined not to be contraband were returned.

18. Agent Millar recalled that items were returned to the Beins, or to their counsel, on three occasions.

19. Millar testified that, approximately two months after the seizure, a variety of goods were returned because the Government could not determine that they were of a stolen nature.

20. Government Exhibit 1, which is an IRS receipt signed by Mrs. Bein dated December 14, 1994, confirms that a number of items were returned, including: makeup cases; hair items; office supplies; computer disks; toys; toasters; answering machines; desk lamps; pictures with frames; and Christmas items.

21. On March 13, 1995, Agent Haefner returned to Mr. Bein numerous items seized pursuant to the warrants, including: 2 videos; checks in the amount of $17.48, $2,566.24 and $50.00; and four Canadian Postal money orders. *See* Defendants' Exhibit J.

22. On January 17, 1995, Agent Haefner of the IRS released to counsel for the Beins a copy Of "Jencks" material; copies of "purchase orders/invoices" seized pursuant to the warrants; and a number of computer equipment items. *See* Government Exhibits 2 and 4.

23. Finally, on November 20, 1996, $2,410.00 in cash seized pursuant to the warrants was returned. *See* Government Exhibit 3.

(D) *Destruction of Items*

24. Detective Conn testified that various items seized during the execution of warrants on October 3, 1994 were destroyed between April 9th and April 11th, 1996. Conn explained that he was aware of the Court's Order to return property, but understood the Court to mean only that property which was not contraband.

25. I find that Conn's interpretation is consistent with this Court's intention. Defendants' Exhibit H is the Destruction Log of those items seized during Operation Fence Fry and destroyed between April 9th and April 11, 1996.

26. The Destruction Log identifies the Beins as the source for those items seized pursuant to the warrants, and which are described as Bulky No. 1B-325 (stolen goods); Bulky No. 1B-331 (stolen goods); Bulky No. 1B-337 (stolen goods); and Bulky No. 1B-340 (documents).

27. The Beins culled information from the Inventory Log and the Destruction Log to ascertain what items allegedly had been improperly seized and destroyed. These items are listed in Defendants' Exhibit A.

28. Exhibit A includes several items[1] for which the Beins did not submit proposed findings of fact and conclusions of law. Accordingly, I find that the Beins have abandoned any claim for compensation relating to these items.

29. In the alternative, I find that the Beins failed to satisfy their burden of proof in establishing the existence, improper destruction, and value of these items.

30. With respect to those items which are included in the proposed findings of fact and conclusions of law, I make the following findings:

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[1] i.e., items "sold" to Steve Sykora; glass figurines; purse with money; library floor; closet shelves; dishes; Seiko directory; stocks; microfiche; Buyer's guide from RSA; Zupan lease and video; "multipower 3" and "Transco" glue.

Goods "Sold" to Photaz, Brodt, Allou and K.I.D. International

31. The Beins contend that the Government improperly seized and destroyed documents relating to the sale of such items as disposable cameras, shampoo, toothpaste, and paper goods.

32. The Beins insist that the sale of these goods was legitimate, that the goods were not contraband, and that without the paperwork documenting the sales, they are unable to collect on the contracts.

33. According to the Beins, these contracts amount to $16,000. Although Detective Conn indicated that, in order to foster an air of legitimacy, individuals such as the Beins may sell noncontraband goods, there is simply no credible evidence to suggest that these items were legitimate.

34. I accept, as credible, the testimony of the Government agents that, during extensive debriefing, the Beins never claimed to have engaged in legitimate sales with these entities. Furthermore, Mr. Bein even conceded at the hearing that approximately 80% to 90% of all of the goods which he sold to these companies were Contraband.

35. Even were I to accept the Beins' representations as credible, which I do not, I find that the Government returned all of the appropriate documentation. Government agents testified, and Exhibits 2 and 4 reflect, that all invoices/purchase orders were returned to the Beins during pretrial proceedings.

36. As such, the Beins have not been deprived of the documents which they claim to need.

37. Finally, and in the alternative, I find Mr. Bein's allegations that they are unable to collect on the contracts to be wholly speculative. Mr. Bein acknowledged that he had not actually tried to collect. Instead, he merely predicts that, given his felony conviction, a trier of fact would not find his testimony to be credible.

38. I find this to be an insufficient effort to prove that the disputed amounts are, in fact, uncollectible.

Gemachs

39. The Beins also demand compensation in the amount of $453,800 for the alleged destruction of documents referred to as "gemachs."

40. Testimony presented at the hearings established that Orthodox Jews often lend money to various Jewish institutions. The gemachs are a series of checks or "IOUs" which identify the maker, the amount of money pledged to be redeemed on a certain date, and the payee. The Beins testified that the documents would have been written in Hebrew.

41. The Beins testified that they had possession of gemachs totaling $420,000, which were given to them by Mrs. Bein's late uncle, and $33,500 of their own gemachs.

42. According to the Beins, they made multiple copies of the gemachs and placed them throughout the house. Without the gemachs, the Beins contend, they cannot collect on the loans.

43. I do not find any credible evidence to support the Beins' contention that over $450,000 in gemachs were seized and destroyed.

44. The testimony elicited at the hearing established that Agent Haefner reviewed every document seized from the Bein residence. She testified that her purpose in reviewing the documents was to track any evidence of income to the Beins and that she would have recalled seeing any loan documentation of this nature. She further represented that she did not recall seeing any documents containing the word "gemach," and that she did not recall seeing multiple copies of the same documents.

45. I find Haefner's testimony to be credible and conclude that the Government did not improperly seize and destroy the alleged documents.

46. In the alternative, I find that even if the Government seized and improperly destroyed the gemachs, the Beins have not established that the destruction of the documents precludes them from collecting on the loans.

47. For instance, neither of the Defendants testified that an institution refused to honor a loan.

48. Nor did the Defendants proffer any evidence indicating that they took steps to ascertain which institutions received loans. Indeed, all the Beins did was claim, without any supporting documentation, that the attorney representing Mrs. Bein's late uncle suffers from Alzheimers, and is unable to help gather this information.

49. I decline to give credence to such bald, unsupported assertions.

Warehouse Merchandise

50. According to the Beins, the Government improperly seized and destroyed $16,000 worth of merchandise located in the warehouse. The merchandise allegedly consisted of toothbrushes, soaps, toothpaste, Revlon items and G.E. lightbulbs.

51. The Beins contend that Defendants' Exhibit I, a letter to counsel for the defense from Jeffrey Killeen of the FBI, acknowledges that such items were destroyed.

52. I disagree. The letter indicates only that toothbrushes were destroyed, but denies all other allegations. I reject the Beins' assertion that the toothbrushes were legitimate goods.

53. Agent Millar conceded that he never knew the Beins to be involved with stolen toothbrushes. Yet he opined that, given his years of experience, he believed the toothbrushes were stolen. He explained that the toothbrushes had various retail stickers on them and that this was consistent with stolen merchandise.

54. I find Agent Millar's testimony to be credible.

55. As to the Revlon items, I find that all of the seized Revlon products and other items were returned to the Beins on December 14, 1994 as evidence by Government Exhibits 2 and 4.

Carts

56. The Beins claim entitlement to $1,500 for the destruction of 6 carts valued at $250.00 a piece. The Government agrees that five of the six carts were improperly destroyed and that the sixth cart should be returned. *See* Docket No. 94, p. 21.

57. I find Mr. Bein's testimony as to the value of the carts to be credible and further find that the loss attributable to the destruction of the carts to be reasonable. I also find that the Beins are entitled to the return of the remaining cart.

Photographs

58. According to the Beins, the Government seized and destroyed numerous wedding and family photographs. They claim to have had numerous photographs spread out on a ping pong table in the basement. They explained that they were using them in preparing a gift for their son.

59. While the Inventory Log does note that "miscellaneous photographs" were found in a closet in the hall, there are no entries indicating that photographs were taken from a ping pong table.

60. Furthermore, each agent testified that they did not recall seeing a large number of wedding or family photographs. Agent Haefner specifically testified that she would have recalled seeing any.

61. I accept this testimony as credible.

62. Finally, the FBI report memorializing those items destroyed reflects only that photographs gathered pursuant to the Spelic search warrant were destroyed.

63. Consequently, I find that the Government did not improperly seize and/or destroy a large number of wedding and family photographs.

Keys

64. The Beins claim, and the Government concedes, that the Government improperly destroyed several keys.

65. Mr. Bein testified that he spent approximately $300 replacing locks and keys for their residence, warehouse and cars.

66. Although the Government urges that there is no credible evidence regarding the value of the keys, I find Mr. Bein's testimony to be credible.

Memorabilia

67. The Beins also claim to have had 10-15 copies each of more than 17 letters written in Hebrew from noted rabbinical scholars and/or famous Orthodox Jews.

68. According to Mr. Bein, many of these letters were addressed to either his wife or him, or to their parents.

69. The Beins presented expert testimony valuing these items collectively at $40,000. The expert had never seen the letters, and relied solely upon the Beins' representations concerning the existence, the condition, the author, the content, and the age of the letters.

70. The Beins charge the Government with improperly seizing and destroying these letters.

71. I find the Beins testimony to lack credibility in this regard.

72. As stated above, I accept Agent Haefner's testimony as credible. Agent Haefner testified that she did not see any documents which had been copied 10 to 15 times.

73. Moreover, Haefner explained that she saw only a few "Jewish documents" and that she had a fellow agent translate them for her. She then understood them to be referring to a "Heter Iskah" - which is apparently some type of loan (other than a gemach). There is no indication that the documents were personal letters.

Briefcases

74. The Beins also claim that two briefcases were seized and improperly destroyed. The Government acknowledges the same. Thus, I find that the Government improperly seized and destroyed two leather briefcases.

75. I do not, however, accept as credible the Defendants' contention that the briefcases were worth $600. First, the Defendants did not direct this Court to any portion of the record in which a witness stated that the briefcases were worth $600. Second, Mr. Bein testified that he received one briefcase as a gift in 1974 or 1975, and that he received the other in 1981 or 1982.

76. I find it entirely too speculative to conclude that two briefcases which were approximately 20 years old were worth $600.

Lawsuit — Woodhill Supply

77. The Beins were allegedly involved in a legal dispute with a contractor who had done some work on their home.

78. As a result of the alleged seizure and improper destruction of documents and a video detailing the home repairs, the Beins contend, they were unable to produce checks and invoices documenting payment of disputed claims, and incurred $15,000 worth of loss.

79. I agree that entries F44-46 on the Inventory Log suggest that the documents pertaining to a lien were seized, but I do not see any indication that videos were taken.

80. Yet even if I were to accept as credible the Beins' assertions that such documents were destroyed, there exists no credible evidence upon which to base the conclusion that the destruction cost the Beins $15,000 in losses. For instance, the Beins did not produce a copy of the lien. Nor did they produce a copy of the judgment.

81. Simply stated, there is no independent evidence supporting their contention that the loss was $15,000.

82. Furthermore, there is no evidence other than Mr. Bein's bald assertion, that any loss should have been placed upon the contractor.

83. I acknowledge that the invoices which were allegedly destroyed would have been the most obvious means of proof that the Beins had paid the contractor, but I also believe that the Beins could have proffered copies of their bank records which would reflect that certain checks were paid, or that cash in the amount of a disputed payment was withdrawn on a particular clay. It does not appear that they made any such efforts before the Ohio court.

84. In sum, I find the Beins' assertion of a loss caused by the destruction of the documents to lack credibility, and that the record

is devoid of any reliable evidence regarding the amount of any such loss, or responsibility for the loss.

Computer Programs

85. The Beins complain, and the Government agrees, that agents improperly destroyed computer diskettes. Although the Government does not concede as much, the Beins contend that between 500 and 600 diskettes were destroyed.

86. According to the Beins, the diskettes were program diskettes, such as "Windows" and children's games, rather than data diskettes.

87. Prior to the execution of the search warrants, Mr. Bein claimed, he had been able to use certain information from the existing diskettes to purchase updates for many of the programs, Because the diskettes have since been destroyed, he no longer has the option of buying program updates, but must buy new programs themselves.

88. Mr. Beins estimated that replacing all of the seized programs diskettes would cost approximate $6,000.00.

89. I find this testimony to be incredible. The $6,000 estimate is wholly speculative. Mr. Bein was able to recall only a few programs and made absolutely no effort to supply any sort of basis for his claimed loss. Certainly the Defendants could have brought in price lists from a computer store or something of that nature.

90. Furthermore, based upon Mr. Bein's own testimony, he need not replace 500-600 diskettes. Rather, at least some portion of the diskettes were mere "updates," the replacement of which are unnecessary.

91. As it stands, I find a sum as large as $6,000, for which the Defendants offer no specificity regarding the nature and type of program diskettes destroyed, the number of diskettes to be replaced, or even any corroborating proof as to replacement cost, to be wholly speculative and unreasonable.

Airline Ticket

92. Mr. Bein also claimed that Mrs. Bein's airline ticket to Israel was lost. According to Mr. Bein, the agents seized the ticket and failed to return it. He further contends that because they were unable to recall the flight information and/or provide a doctor's excuse for not traveling, Delta would not refund the purchase price of the ticket.

93. The Inventory Log reflects only that airline "information" was taken. *See* Government Ex. 5, Line 03. There is no indication that an actual ticket was taken.

94. I find the Beins' assertions to the contrary to be incredible.

95. Furthermore, I have difficulty accepting the implicit contention that Mrs. Bein could not recall at least the dates upon which she traveled, or that the Beins could not reproduce a credit card statement or canceled check confirming that they had paid for a ticket.

96. Neither did the Beins offer any written documentation supporting Delta's alleged refusal to refund the price, or of Delta's requirement that Mrs. Bein provide a doctor's excuse.

97. In short, I find the Beins' assertions in this regard to lack credibility.

Important Papers and invitations

98. The Beins argue that the Government destroyed important personal papers such as diplomas, marriage documents, ordination certification, and invitations to a wedding and a bar mitzvah.

99. I do not find the Beins' testimony regarding the existence and destruction of personal papers, other than the invitations as detailed below, to be worthy of credence. There is no indication in the Inventory Log that such items were taken, nor did any agent testify to seeing such items.

100. However, the Inventory Log does contain two entries for "invitations." Additionally, Agent Millar testified that he recalled seeing bar mitzvah invitations, which he further believed had been marked as destroyed.

101. Mr. Bein testified that the actual cost of the wedding invitations was $200. I find his testimony in this regard to be credible, and that the sum of $200 is reasonable.

102. Although there is no evidence of the cost of the bar mitzvah invitations, I find it reasonable to presume that they also cost approximately $200.00.

Fax Machine

103. The Beins also claim that a new fax machine was improperly seized and destroyed. The Government does not dispute this contention.

104. Mr. Bein testified that the machine was brand new, and cost approximately $500.00. The Government did not offer any evidence controverting this amount.

105. I find Mr. Bein's testimony as to the cost to be credible, and the sum of $500 to be reasonable.

Lucas-Tenant

106. Finally, the Beins claim that the Government improperly destroyed documents relating to repairs on property in Canada. Specifically, the Beins urge that, lacking appropriate documentation, they were unable to persuade their insurance carrier that they bore no responsibility for certain losses incurred by their tenants. As a result, their insurance premiums increased by $2,000 a year.

107. I find that the Beins' claim is far too speculative to award compensation. For instance, they did not tender any proof of what they pay for insurance, or that their premiums increased by $2,000.

108. Furthermore, as to the underlying matter, the Beins did not provide any details of the nature of the dispute, the amount in controversy, or an explanation of what the documents consisted of or why they would have ensured their success.

109. I am left simply with Mr. Bein's bald, conclusory, and unsupported allegations, which I find to be incredible.

CONCLUSIONS OF LAW

1. "The general rule is that seized property other than contraband, should be returned to its rightful owner once the criminal proceedings have terminated." *United States v. Brant*, 684 F. Supp. 421, 423 (M.D. N.C. 1988), *aff'd*, 865 F.2d 1260 (4th Cir. 1988), *quoting, United States v. La Fatch*, 565 F.2d 81, 83 (6th Cir. 1977), *cert. denied*, 435 U.S. 971 (1978).

2. Indeed, I have "both the jurisdiction and the duty to ensure the return to a defendant of 'that property seized from him in the investigation but which is not ...stolen, contraband, or otherwise forfeitable, and which is not needed, or is no longer needed, as evidence.' " *Brant*, 684 F. Supp. at 424, *quoting, United States v. Wilson*, 540 F.2d 1100, 1101 D.C. Cir. 1976).

3. By seizing the property pursuant to valid search warrants, I conclude that the Government has met its burden of establishing the reasonableness of the search. *See Otonye v. United States*, 903 F. Supp. 357, 363-64 n. 8 (E.D. N.Y. 1995).

4. The Beins thus bear the burden of proving "the extent and value of [the] claimed property...." *Otonye*, 903 F. Supp. at 364 n. 8.

5. As set forth in the Findings of Fact, the Beins did not satisfy the burden of proving the existence of the following items: the gemachs; rabbinical letters; personal items; noncontraband items; photographs; the lawsuit; ticket to Israel; the increase in insurance premiums; items "sold" to Steve Sykora; glass figurines; purse containing money; library floor; closet shelves; dishes; Seiko directory; stocks; microfiche; Buyer's Guide from RSA; Zupan lease and video; "multipower 3"; and "Traco" glue.

6. Nor did the Beins satisfy their burden of proof regarding the value of: the briefcases and the computer diskettes.

7. Consequently, the Government does not have any obligation with respect to these items.

8. The Beins' inclusion of these items in the pending Motion did not, however, constitute fraud, unconscionability or bad faith.

9. As such, the clean hands doctrine does not preclude them from seeking equitable relief for the remaining items.

10. The Beins did meet their burden of proving the existence and value of the following items: six carts; keys; invitations; and fax machine.

11. Because the Government still retains possession of one of the carts, I conclude that it must return it to the Beins.

12. It is undisputed that the Government no longer has the remaining items, and thus cannot return them.

13. In response to the Beins' request for compensatory damages, the Government contends that this Court lacks the requisite jurisdiction.

14. I disagree. "Post conviction filings for the return of property seized in connection with a criminal case are treated as civil equitable actions, and the district court where the claimant was tried has subject-matter jurisdiction ancillary to its criminal jurisdiction to hear the equitable action." *Thompson v. Covington*, 47 F.3d 874, 875 (8th Cir. 1995), *citing, Rufu v. United States*, 20 F.3d 63, 65 (2d Cir. 1994) (per curiam) (district court where defendant tried has ancillary jurisdiction to decide post-trial motion for return of property; motion treated as civil complaint for equitable relief and court must make findings to identify items government still possesses, and then fashion relief); and *Mora v. United States*, 955 F.2d 156,158-59 (2d Cir. 1992 (same).

15. As did the court in *United States v. Martinson*, 809 F.2d 1364, 1368 (9th Cir. 1987), I recognize "that there are cases holding that damages are unavailable in a proceeding based on a motion for return of property." *See also Otonye v. United States*, 903 F. Supp. 357, 360-61 (E.D. N.Y. 1995) (citations omitted).

16. Yet, I too "find these reasons unpersuasive in light of the equitable powers of the court. When a citizen has invoked the jurisdiction of a court by moving for return of his property, [I] do not think that the government should be able to destroy jurisdiction by its own conduct." *Martinson*, 809 F.2d at 1368.

17. "The government should not at one stroke be able to deprive the citizen of a remedy and render powerless the court that could grant the remedy." *Id.*

18. Here, as detailed in the Findings of Fact, the Government destroyed the property at issue *after* this Court ordered its return. Consequently, I conclude that I have ancillary jurisdiction to award damages.

19. The Beins satisfied their burden in proving the following values, all of which I find reasonable and appropriate, and I conclude that the Government is obligated to tender to the Beins the following amounts: Carts $1,250; keys $300; Invitations $400; and fax machine $500 for a total of $2,450.00.

****

DATE FILED: **JULY 7, 1999**

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

-vs-

WILLIAM BEIN and EASTER BEIN, } **Criminal No. 94-214**

Defendants.

AMBROSE, District Judge.

ORDER OF COURT

AND NOW, this this ____th day of July, 1999, for the reasons set forth in the accompanying Findings of Fact and Conclusions of Law, the Motion for Return of Seized Property (Docket No. 74) is granted in part and denied in part. It is **ORDERED** that the Motion is **GRANTED** insofar as the Government is required to return the remaining cart, and tender the following amounts: $1,250 (carts); $300 (keys); $400 (invitations); and $500 (fax machine). The Motion is **DENIED** in all other respects.

BY THE COURT:

/s/ Donetta W. Ambrose

Donetta W. Ambrose,
U. S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

v.

WILLIAM BEIN and ESTHER BEIN, } **Criminal No. 94-214**

Defendants.

AMBROSE, District Judge.

MOTION TO AMEND AND/OR ALTER JUDGMENT PURSUANT TO F.R.C.P. 59(e)

19. The Beins object to this finding only to the extent it provides a value of only $400.00 for invitations based on the actual cost of printing, and nothing for sentimental value, and provides nothing for other items claimed to have been destroyed. In all other respects it has no objection to Conclusions of Law 19.

GREENFLELD, BREWER,
BAILOR & KAY

/s/ Stanley W. Greenfield, Esquire

Stanley W. Greenfield, Esquire
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8/18/99

After careful consideration of the parties' submissions, the Motion to Amend and/or Alter Judgment (Doc. No. 101) is denied.

Donetta W. Ambrose

UNITED STATES OF AMERICA v. ESTHER **BEIN** and WILLIAM **BEIN**, Appellants.

No. 99-3822

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

214 F.3d 408; 2000 U.S. App. LEXIS 12234

May 9, 2000, Argued
June 5, 2000, Filed

PRIOR HISTORY: [** 1] On Appeal from the United States District Court for the Western District of Pennsylvania. (D.C. Crim. No. 94-214). District Judge: Hon. Donetta W. Ambrose.

DISPOSITION: Order of district court entered July 9, 1999 vacated and remanded. Order of August 18, 1999, affirmed. Case remanded to district court for entry of an order in accordance with this opinion.

COUNSEL: Stanley W. Greenfield (argued), Daniel J. Kraut, Greenfield, Brewer & Kay, Pittsburgh, PA, Attorneys for Appellants.

Harry Litman, United States Attorney, Bonnie R. Schlueter (argued), Assistant United States Attorney, Pittsburgh, PA, Attorney for Appellee.

JUDGES: Before: GREENBERG, McKEE, and GARTH, Circuit Judges.

OPINIONBY: GREENBERG

OPINION: [*410] OPINION OF THE COURT

GREENBERG, Circuit Judge.

I. INTRODUCTION

This matter is before this court on an appeal by Esther and William **Bein** from an order of the district court entered August 18, 1999, denying their motion to amend or alter an order entered July 9, 1999, denying in part their motion pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure for return of property. The **Beins**, alleging the Government wrongfully had destroyed or failed to return their property, filed their Rule 41(e) [**2] motion to

recover compensatory damages or the return of the property. The district court granted the motion in part, awarding damages in the amount of $2,450, and ordering the Government to return a cart in its possession. The court, however, denied the **Beins'** motion with respect to their claim for losses of other property. The **Beins** appeal, seeking additional damages.

Although the Government has not appealed, it asserts, as it did in the district court, that the court did not have jurisdiction to entertain the **Beins'** Rule 41(e) motion to the extent that it sought compensatory damages. Because we find that sovereign immunity bars a claim against the Government seeking money damages under Rule 41(e), we will vacate the order of the district court entered July 9, 1999, insofar as it awarded damages. We do not, however, disturb the order with respect to the return of the cart. Inasmuch as the district court did not have jurisdiction to award damages, we do not consider on the merits the arguments the **Beins** raise as they advance them only in an attempt to recover additional damages. Thus, we will affirm the order of August 18, 1999, denying the **Beins'** motion to amend the order of July 9, 1999. [**3]

This matter arises out of the investigation and arrest of the **Beins** and their subsequent prosecution in the district court. On October 3, 1994, agents of the Federal Bureau of Investigation arrested the **Beins** who then were charged with conspiracy and interstate transportation of stolen merchandise. Following the filing of a superseding indictment, the **Beins** pleaded guilty to conspiracy to commit interstate transportation of stolen property and conspiracy to launder money.

At the time of the **Beins'** arrest, the Government executed search warrants at their home and at their wholesale toiletries and pharmaceutical products business.[1] The Government maintained an inventory of all items that were seized. See app. at 9-25. At the **Beins'** sentencing hearing, the court directed the Government to return all non-contraband items to the **Beins.**

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[1] FBI, Internal Revenue Service agents and a number of local police officers who were deputized as United States Marshals executed the warrants as part of an investigation called Operation "Fence Fry." The Pittsburgh Police Department placed the goods seized from the **Beins** in a forfeiture lot it maintained. The IRS stored all documents seized.

There is no dispute that the Government returned certain items to the **Beins**. Nevertheless, the **Beins** filed their motion pursuant to Fed. R. Civ. P. 41(e) as they asserted that the Government did not return many items seized and instead destroyed them. Consequently, in their Rule 41(e) motion the **Beins** largely sought to recover monetary damages to compensate them for their loss. Indeed, the **Beins** acknowledge that the Government told them before they filed their Rule 41(e) motion that the property it had not returned had been destroyed.

The **Beins** alleged in particular that the Government improperly had destroyed (1) documentation of goods sold to certain entities, (2) gemachs,[2] (3) certain warehouse merchandise, (4) six carts, (5) photographs, (6) keys, (7) memorabilia, (8) two briefcases, [*411] (9) documents related to a particular lawsuit, (10) computer programs, (11) an airline ticket, (12) certain important papers and invitations, (13) a fax machine, and (14) documents relating to the repair of a property in Canada the **Beins** owned. As we have indicated, the district court determined that the Government retained in its possession one of the six carts for which the **Beins** sought damages [**5] and ordered its return, a matter not in issue on this appeal. The court further determined that the Government wrongfully had destroyed five carts, the keys, a fax machine and wedding and bar mitzvah invitations. Inamsuch as the Government could not return these items, the court awarded the **Beins** $2,450 in damages to compensate them for their loss. The district court found, however, that the **Beins** had not established that the Government took possession of the remaining property or had not presented adequate proof of damages for its loss. The **Beins** have appealed from the order of the district court to the extent it denied their Rule 41(e) motion seeking damages for this remaining property. We have jurisdiction over their appeal pursuant to 28 U.S.C. §1291.

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[2] A gemach is a promissory note representing a loan made to a charitable organization. The loan is repaid at an agreed upon date by either the borrower or a third party making payment on behalf of the borrower. The gemach is considered under Orthodox Jewish Law to be a high form of charity because the repayment relieves the recipient of any feeling of obligation to the donor. See App. at 231-35.

II. DISCUSSION

It is well settled that the Government may seize evidence for use in investigation and trial, but that it must return the property once the criminal proceedings have concluded, unless it is contraband or subject to forfeiture. See United States v. Chambers, 192 F.3d 374, 376 (3d Cir. 1999); see also United States v. Premises Known as 608 Taylor Ave., Apartment 302, 584 F.2d 1297, 1302 (3d Cir. 1978); United States v. Wilson, 176 U.S. App. D.C. 321, 540 F.2d 1100, 1103 (D.C. Cir. 1976) (district court has both the jurisdiction and duty to return property against which no government claim lies). A person aggrieved by the deprivation of property may file a motion under Rule 41(e) to request its return. See Chambers, 192 F.3d at 376; Government of Virgin Islands v. Edwards, 903 F.2d 267, 273 (3d Cir. 1990). A district court has jurisdiction to entertain a motion for return of property even after the termination of criminal proceedings against the defendant and such an action is treated as a civil proceeding for equitable relief. See United States v. McGlory, 202 F.3d 664, 670 (3d Cir. 2000) (en [**7] banc); Chambers, 192 F.3d at 376-77 (citing United States v. Martinson, 809 F.2d 1364 (9th Cir. 1987); Rufu v. United States, 20 F.3d 63, 65 (2d Cir. 1994); Thompson v. Covington, 47 F.3d 974, 975 (8th Cir. 1995)). Further, even if it is alleged that the property the movant seeks to have returned is no longer within the Government's possession, the district court has jurisdiction to determine whether such property had been in its possession and whether it wrongfully disposed of such property. See Chambers, 192 F.3d at 378.

The **Beins** filed their Rule 41(e) motion primarily seeking not the return of their property, but rather compensatory damages for property they alleged the Government wrongfully destroyed. The Government asserts the district court did not have subject matter jurisdiction to address such a claim under Rule 41(e).[3] For [*412]

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[3] The Government also asserts that the **Beins'** appeal was not timely. See Appellee Br. at 1-3. The Government argues that, because Rule 41(e) is a rule of criminal procedure, the time for appeal should be ten days, as opposed to the 60 days that would be allowed for a civil appeal in a case in which it is a party. See id. As noted by the Government, those courts that have addressed the issue have held that because Rule 41(e) motions filed after the conclusion of criminal proceedings are treated as civil proceedings in equity, the time period for filing a notice

the reasons set forth below, we find that, as a result of the Government's immunity from suit, the district court lacked subject matter jurisdiction over the **Beins'** claims for monetary damages.

While the Government has not appealed from the order entered in the district court, it asserts that, based upon its sovereign immunity, the district court did not have jurisdiction to enter a claim for monetary damages as relief on a Rule 41(e) motion. See Appellee Br. at 4-6. But the Government need not have appealed formally from the order of the district court for us to consider this issue as a claim of sovereign immunity advances a jurisdictional bar which a party may raise at any time, even on appeal, and which the court may raise sua sponte. See Brown v. Secretary of the Army, 316 U.S. App. D.C. 284, 78 F.3d 645, 648 (D.C. Cir. 1996); see also United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 514, 60 S. Ct. 653, 657, 84 L. Ed. 894 (1940) ("Consent alone gives jurisdiction to adjudicate against a sovereign. Absent that consent, the attempted exercise of judicial power is void.").

It is a fundamental principle of sovereign immunity that federal courts do not have jurisdiction over suits against the United States unless Congress, via a statute, expressly and unequivocally waives the United States' immunity to suit. See United States v. Mitchell, 463 U.S. 206, 212, 103 S. Ct. 2961, 2965, 77 L. Ed. 2d 580 (1983). [**9] Moreover, when the Government does consent to be sued, "the terms of [the] waiver of sovereign immunity define the extent of the court's jurisdiction." United States v. Mottaz, 476 U.S. 834, 841, 106 S. Ct. 2224, 2229, 90 L. Ed. 2d 841 (1986). "Waivers of the Government's sovereign immunity, to be effective,

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of appeal in civil cases should be applied for the sake of simplicity and clarity. See id. at 3 (citing United States v. Madden, 95 F.3d 38, 39 n.1 (10th Cir. 1996); United States v. Garcia, 65 F.3d 17, 18 n.2 (4th Cir. 1995); Hunt v. U.S. Dep't of Justice, 2 F.3d 96 (5th Cir. 1993); United States v. Taylor, 975 F.2d 402, 403 (7th Cir. 1992); Martinson, 809 F.2d at 1367). While we have not addressed this issue, we do not find any compelling reason to part from the consensus that appears to have arisen among those courts that have done so. Accordingly, we find that the time for appeal applicable to civil actions should apply in the context of an appeal from a post-conviction decision on a Rule 41(e) motion and thus, as the **Beins** appealed within 60 days of August 18, 1999, their appeal is timely. Of course, we do not consider whether a Rule 41(e) motion made during the pendency of the criminal proceedings should be treated as a civil proceeding for purposes of calculating the time for appeal as that issue is not before us.

must be 'unequivocally expressed,' " and any such waiver must be construed strictly in favor of the sovereign. United States v. Nordic Village, Inc., 503 U.S. 30, 33-34, 112 S. Ct. 1011, 1014-15, 117 L. Ed. 2d 181 (1992).

As we have indicated, we are concerned with Fed. R. Crim. P. 4 1(e) which reads:

> Motion for Return of Property. A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property. The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be returned to the movant, although reasonable conditions may be imposed to protect access and use of the [** 10] property in subsequent proceedings. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

Inasmuch as Rule 41(e) motions are treated as civil equitable actions, see n.3, supra, in light of its equitable powers the district court concluded that it had ancillary jurisdiction to award damages to the **Beins** and against the United States.

Unquestionably the district court had reason to believe that it could award damages as some courts have suggested that a court under Rule 41(e) "has power to award damages incident to the complaint." United States v. Martinson, 809 F.2d at 1367-68; see also United States v. Kanasco, Ltd., 123 F.3d 209, 210 n.1 (4th Cir. 1997); Mora v. United States, 955 F.2d 156, 159-60 (2d Cir. 1992). Other courts, however, have disagreed with this approach. [*413] See, e.g., Pena v. United States, 157 F.3d 984, 986 (5th Cir. 1998); United States v. Chambers, 92 F. Supp. 2d 396, 2000 WL 369786, at *3-6 (D.N.J. 2000). We seem never to have made a definitive [**11] ruling on the point and thus we make our own analysis of the issue.

Sovereign immunity protects the Government from suit except insofar as it has waived that immunity. A waiver must be expressed

unequivocally in statutory text and will not be implied. See Lane v. Pena, 518 U.S. 187, 192, 116 S. Ct. 2092, 2096, 135 L. Ed. 2d 486 (1996) (citations omitted). Rule 41(e), however, does not expressly authorize an award of monetary damages and thus a court's jurisdiction to award damages pursuant to that rule is questionable.

Notwithstanding the absence of an express provision in Rule 41(e) authorizing an award of damages, the Court of Appeals for the Ninth Circuit has stated that this omission is not controlling with respect to the availability of damages under that rule. Thus, in Martinson it indicated:

> When a citizen has invoked the jurisdiction of a court by moving for return of his property, we do not think that the government should be able to destroy jurisdiction by its own conduct. The government should not at one stroke be able to deprive a citizen of a remedy and render powerless the court that could grant the remedy.

Martinson, 809 F.2d at 1368. [**12] The court feared that if it allowed the Government to moot a motion for return of property by giving the property away or destroying it, it would be encouraging the United States to undertake unilateral actions which would have the effect of circumventing the judicial process. See id. While we respect this policy argument, it overlooks the fact that a determination of whether Rule 41(e) authorizes an award of damages raises a question not of mootness, but of jurisdiction. Moreover, application of sovereign immunity, by its very nature, will leave a person wronged by Government conduct without recourse.

Indeed, a more recent decision of the Court of Appeals for the Ninth Circuit appears to be contrary to its reasoning in Martinson to the extent it held that a district court has jurisdiction to award monetary damages despite the fact that Rule 41(e) does not expressly provide for such an award. In United States v. Woodley, the court considered the question of whether a court could impose a monetary sanction on the United States under the Federal Rules of Criminal Procedure. See 9 F.3d 774 (9th Cir. 1993). Fed. R. Crim. P. 16(d)(2) provides a court with the authority to [**13] "prescribe such terms and conditions as are just" to remedy a violation of a discovery order. See id. at 782 (quoting Rule 16 (d)(2)). The court found that because Rule 16(d)(2) did not include independent

authority for a monetary sanction it would decline to recognize that the rule waived sovereign immunity. Accordingly, the sanction could not be imposed. See id. at 781. It seems to us that this conclusion is at odds with the result in Martinson. Moreover, Rule 16(d)(2) is broader than Rule 41(e) in that Rule 16(d)(2) allows a court to prescribe such terms and conditions as are just, whereas Rule 41(e), even though proceedings under it are treated as general equitable actions, only provides for one express remedy — the return of property.

After careful analysis we reject the cases which allow an award of damages in a proceeding under Rule 41(e) as we conclude that a Federal Rule of Criminal Procedure that does not expressly provide for an award of monetary damages does not waive sovereign immunity. n4 [*414] We find the reasoning of the Court of Appeals for the Fifth Circuit in Pena and of the United States District Court for the District of New Jersey in Chambers [**14] to be persuasive on this point.

The court in Pena reasoned as follows:

> Pena has named the United States as the defendant in his case. The principle of sovereign immunity protects the federal government from suit except insofar as that immunity is waived. A waiver must be unequivocally expressed in statutory text and will not be implied. See Lane v. Pena, 518 U.S. 187, 192, 116 S. Ct. 2092, 2096, 135 L. Ed. 2d 486 (1996) (citations omitted). Rule 41(e) makes no provision for monetary damages, and we will not read into the statute a waiver of the federal government's immunity from such damages. Numerous Supreme Court decisions hold that courts should construe statutes against waiver unless Congress has explicitly provided for it. See, e.g., Lane, 116 S. Ct. at 2097 (refusing to allow monetary damages under §504(a) of the Rehabilitation Act of 1973, 29 U.S.C. §791 et seq., where the relevant

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[n4] The case law suggests that sovereign immunity may be waived only by a clear statutory expression of waiver; legislative history will not suffice to operate as a waiver. See United States v. Nordic Village, Inc., 503 U.S. at 37, 112 S. Ct. at 1016. Given our holding in this case, however, we need not address the broader question of whether rules of procedure, standing alone, can be found to constitute a waiver of sovereign immunity.

> statutory provisions failed to provide the 'clarity of expression necessary to establish a waiver of the Government's sovereign immunity against monetary damages'); United States v. Nordic Village, Inc., 503 U.S. 30, 33-34, 112 S. Ct. 1011, 1014-15, 117 L. Ed. 2d 181 (1992) [**15] (holding that although the contemporary §106(c) of the Bankruptcy Code waived sovereign immunity, 'it failed to establish unambiguously that the waiver extended to monetary claims'). However compelling his case, Pena may not maintain a suit against the United States for monetary damages under Rule 41(e).

Pena, 157 F.3d at 986. The district court in Chambers agreed. See Chambers, 2000 WL 369786 at *3.

In this case the district court appeared to have assumed, and the **Beins** have argued, that because the courts have construed Rule 41(e) to [**16] grant a district court the power to award certain equitable relief, the court had jurisdiction to award complete relief, which in certain circumstances could include an award of monetary damages. While this line of reasoning may have merit in analogous situations with respect to a non-governmental entity, it does not properly address the sovereign immunity claim raised by the Government. In fact, the Supreme Court has found that the waiver of sovereign immunity does not extend beyond the express terms of the waiver. See Department of the Army v. Blue Fox, Inc., 525 U.S. 255, 119 S. Ct. 687, 142 L. Ed. 2d 718 (1999).

In Blue Fox the respondent sued the Army under section 702 of the Administrative Procedures Act, which provides in relevant part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall [**17] not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

Id. at 260, 119 S. Ct. at 691 (citing 5 U.S.C. §702). The respondent asked the Court to find that the provision waiving sovereign immunity from actions seeking relief other than money damages would allow it to seek a lien on funds held by the United States. See id.

The court of appeals in Blue Fox had read an earlier decision of the Supreme Court as standing for the proposition that section 702's reference to "other than money damages" constituted a waiver of sovereign immunity as to all actions equitable in nature. See id. at 261, 119 S. Ct. at 691. The Supreme Court disagreed, finding that the waiver of sovereign immunity must be found in the language of the statute, [*415] and thus proceeded to determine whether the relief sought by respondents constituted money damages. See id. at 261-62, 119 S. Ct. at 691-92. The Court held that the imposition of the equitable lien sought by respondent was in fact a claim for money damages outside the waiver of sovereign immunity. See id. at 263, 119 S. Ct. at 692. [**18]

In keeping with the reasoning of Blue Fox, to the extent a court may read Rule 41(e) as a waiver of sovereign immunity, it must limit the waiver to the express terms of the rule. We reiterate that Rule 41(e) provides for one specific remedy — the return of property. Although courts treat a motion pursuant to Rule 41(e) as a civil equitable action, such a characterization cannot serve as the basis for subjecting the United States to all forms of equitable relief. A court must strictly construe the scope of a waiver of sovereign immunity in favor of the sovereign. See Blue Fox, 525 U.S. at 261, 119 S. Ct. at 691. The interpretation of Rule 41(e) urged by the **Beins** would apply a liberal construction of the scope of a waiver of sovereign immunity. Consequently, we conclude that the district court erred when it exercised subject matter jurisdiction over the **Beins'** claims for monetary damages. Therefore we will vacate the order of the district court of July 9, 1999, to the extent it awarded the **Beins** monetary damages and we will remand the matter to the district court to dismiss the Rule 41(e) motion, to the extent that it sought monetary damages for lack of subject matter [**19] jurisdiction.

We believe our conclusion is buttressed by a review of the specific instance under the Federal Tort Claim Act ("FTCA") in which the Government has waived sovereign immunity in actions

seeking damages for loss or damage to property. We refer to that waiver not to suggest that any particular remedy is, or was, available in this case, or would be available in future cases involving seizure of evidence in criminal matters, but rather to illustrate the manner in which a Rule 41(e) action for damages could undermine the limitations set forth on the waiver of sovereign immunity in property loss or damages cases.

While the FTCA waives sovereign immunity for certain claims for money damages, that waiver is subject to several limitations. See, e.g., 28 U.S.C. 1346(b)(1) (providing jurisdiction in the district courts for claims for money damages resulting from injury to, or loss of, property caused by the negligence of a Government employee). As particularly germane here, the waiver in section 1346(b) does not extend to any claim "arising in respect. . . of the detention of goods or merchandise by any officer of customs or excise or any other law-enforcement [* *20] officer." 28 U.S.C. §2680(c).

The courts have interpreted section 2680(c) to bar claims premised upon essentially any injury to property sustained during its detention. See Kosak v. United States, 465 U.S. 848, 853-55, 104 S. Ct. 1519, 1523-24, 79 L. Ed. 2d 860 (1984). Further, the courts usually broadly interpret the term law enforcement official within 2680(c). See United States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481, 1490-91 (10th Cir. 1984) (USDA inspectors included); see also Halverson v. United States, 972 F.2d 654, 655-56 (5th Cir. 1992) (INS border patrol agents included); Schlaebitz v. United States Dep't. of Justice, 924 F.2d 193, 194 (11th Cir. 1991) (federal Marshals included); Ysasi v. Rivkind, 856 F.2d 1520, 1525 (Fed. Cir. 1988) (INS border patrol agents included); Formula One Motors, Ltd. v. United States, 777 F.2d 822, 823 (2nd Cir. 1985) (DEA agents included); United States v. Lockheed L-188 Aircraft, 656 F.2d 390, 397 (9th Cir. 1979) (FAA employees included); but see Bazuaye v. United States, 317 U.S. App. D.C. 370, 83 F.3d 482 (D.C. Cir. 1996) [**21] (postal employees not included); Kurinsky v. United States, 33 F.3d 594, 598 (6th Cir. 1994) (section 2680(c) is limited to detention of goods by law enforcement officers acting in tax or customs capacity).

[*416] If a party were to proceed under the FTCA on a negligence theory, then his or her claim for money damages might

be barred because the lost or damaged property was detained by law enforcement officials. Indeed, if the **Beins** had proceeded under the FTCA their action might have been barred on this very basis. See 28 U.S.C. § 2680(c). Thus, granting an award of damages under Rule 41(e) could allow a party to make a recovery pursuant to a procedural rule even though he or she would be barred from such recovery under a statute passed by Congress. Such a result would be incongruous as it would be directly contrary to the intent of Congress.

Finally, we make reference to two of our recent cases. First we observe that our holding today is not inconsistent with our opinion in United States v. Chambers, 192 F.3d 374. In Chambers, we were presented with the question of what role the district court should play when addressing a Rule 41(e) motion [**22] in which the Government asserts it no longer has possession of the property at issue. We concluded that in such a case the District Court must determine, in fact, whether the government retains possession of the property; if it finds that the government no longer possesses the property, the District Court must determine what happened to the property. The District Court must hold an evidentiary hearing on any disputed issue of fact necessary to the resolution of the motion.

> If the District Court concludes that the government's actions. . . were not proper, it shall determine what remedies are available.

Chambers, 192 F.3d at 378 (citations omitted). We did not consider there whether such available remedies would include an award of monetary damages. See id. Indeed, we never mentioned sovereign immunity in our opinion. Second, we note that in our en banc opinion in United States v. One Toshiba Color Television, 213 F.3d 147, 2000 U.S. App. LEXIS 11584, 2000 WL 669978, at * 10 (3d Cir. 2000), we indicated that even if an owner of property obtains an order vacating an order for forfeiture "that [success] does not mean that he is entitled to any monetary relief [**23] or relief in the form of a transfer of property." We, however, did not make a ruling on the point as we merely indicated that under Fed. R. Civ. P. 60(b) such relief might not be available. Again, as in Chambers, we did not discuss sovereign immunity. Thus, our opinion in One Toshiba left open the issue we decide here.

III. CONCLUSION

For the reasons set forth above, we find that the district court did not have jurisdiction over the **Beins'** Rule 41(e) motion to the extent it sought to recover damages for property the Government allegedly destroyed. Accordingly, we will vacate the order of the district court entered July 9, 1999, and remand the matter to the district court for dismissal for lack of jurisdiction insofar as the motion sought and the order awarded monetary damages. Thus, the order of July 9, 1999, shall stand only with respect to the order to the Government to return the one cart in its possession. The order of August 18, 1999, will be affirmed. We will remand the case to the district court for entry of an order in accordance with this opinion.

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Room 829
Pittsburgh, PA 15219

RE: Docket No. 99-3822
USA vs. Bein
D.C. CIV. No. 94-cr-00214

Dear Mr. Drach:

Enclosed is a certified copy of the judgment in the above-entitled case(s), together with copy of the opinion. The certified judgment is issued in lieu of a formal mandate and is to be treated in all respects as a mandate.

(x) We release herewith the certified list in lieu of the record.

Counsel are advised of the issuance of the mandate by copy of this letter. A copy of the certified judgment is also enclosed showing costs taxed, if any.

Very truly yours,
MARCIA M. WALDRON
Clerk

By: /s/ Nicole M. Bruno
Nicole M. Bruno
Case Manager

Enclosure

cc: Bonnie R. Schlueter, Esq.
Stanley W. Greenfield, Esq.
Ms. Esther J. Bein
Mr. William S. Bein

TILE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3822

UNITED STATES OF AMERICA;

v.

ESTHER BEIN;
WILLIAM BEIN,
Appellants

On Appeal from the United States District Court
for the Western District of Pennsylvania
D.C. Crim. No. 94-214
District Judge: Hon. Donetta W. Ambrose

Present: GREENBERG, McKEE, and GARTH, **Circuit Judges**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on May 9, 2000.

On consideration whereof, it is now here ordered and adjudged by this Court that the District Court did not have jurisdiction over the Beins' Rule 41(e) motion to the extent it sought to recover damages for property the Government allegedly destroyed. Accordingly, the order of the district court entered July 9, 1999 is vacated and the matter is remanded to the district court for dismissal for lack of jurisdiction insofar as the motion sought and the order awarded monetary damages. The order of July 9, 1999 shall stand only with respect to the order to the Government to return the one cart in its possession. Thus, the order of August 18, 1999 is

affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/ Marcia M. Waldron
Marcia M. Waldron
Acting Clerk

Dated: June 5, 2000

Certified as a true copy and issued in lieu of a formal mandate on December 13, 2000.

Teste: /s/ Marcia M. Waldron
Marcia M. Waldron
Clerk, United States Court of Appeals for the Third Circuit

(e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property. The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be returned to the movant, although reasonable conditions may be imposed to protect access and use of the property in subsequent proceedings. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

Sec. 2414. Payment of judgments and compromise settlements

Except as provided by the Contract Disputes Act of 1978, payment of final judgments rendered by a district court or the Court of International Trade against the United States shall be made on settlements by the Secretary of the Treasury. Payment of final judgments rendered by a State or foreign court or tribunal against the United States, or against its agencies or officials upon obligations or liabilities of the United States, shall be made on settlements by the Secretary of the Treasury after certification by the Attorney General that it is in the interest of the United States to pay the same.

Whenever the Attorney General determines that no appeal shall be taken from a judgment or that no further review will be

sought from a decision affirming the same, he shall so certify and the judgment shall be deemed final.

Except as otherwise provided by law, compromise settlements of claims referred to the Attorney General for defense of imminent litigation or suits against the United States, or against its agencies or officials upon obligations or liabilities of the United States, made by the Attorney General or any person authorized by him, shall be settled and paid in a manner similar to judgments in like causes and appropriations or funds available for the payment of such judgments are hereby made available for the payment of such compromise settlements.

Supreme Court, U.S.
FILED
JUL 13 2001
CLERK

(3)

No. 00-1469

In the Supreme Court of the United States

ESTHER BEIN AND WILLIAM BEIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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22 pp

QUESTION PRESENTED

Federal Rule of Criminal Procedure 41(e) provides that a person aggrieved by an unlawful search and seizure or by a deprivation of property may move for the return of seized property on the ground that such person is entitled to lawful possession of the property. The question presented is whether Rule 41(e) waives the government's sovereign immunity and authorizes courts to award damages against the government where the property at issue cannot be returned because it has been destroyed or otherwise disposed of.

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In the Supreme Court of the United States

No. 00-1469

ESTHER BEIN AND WILLIAM BEIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 19-31) is reported at 214 F.3d 408. The opinion of the district court (Pet. App. 1-17) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 33-34) was entered on June 5, 2000. A petition for rehearing was denied on December 5, 2000. The petition for a writ of certiorari was not filed until March 15, 2001, and is out of time under Rule 13.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises out of petitioners' arrest and prosecution in connection with charges of conspiracy and interstate transportation of stolen property.

1. On October 3, 1994, petitioners were arrested on charges of conspiracy and interstate transportation of stolen property. Pet. App. 1, 20. That same day, search warrants were executed at petitioners' residence and warehouse. *Ibid.* After a superseding indictment was filed, petitioners pleaded guilty to conspiracy to commit interstate transportation of stolen property and conspiracy to launder money. *Ibid.* At petitioners' March 15, 1996, sentencing hearing, the district court ordered the government to return to petitioners all items that had been seized. *Ibid.*; C.A. App. 425. The government returned certain items to petitioners; it later advised petitioners that any property that had not been returned had been destroyed. Pet. App. 21; C.A. App. 427.[1]

2. In May of 1998, petitioners filed a motion pursuant to Federal Rule of Criminal Procedure 41(e), in which they sought compensatory damages or return of the property. Pet. App. 19-21. Rule 41(e) provides:

> Motion for Return of Property. A person aggrieved by an unlawful search and seizure or by the depri-

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[1] Between December 14, 1994, and November 20, 1996, the government had returned numerous seized items to petitioners. Pet. App. 3. Between April 9 and April 11, 1996, however, the government destroyed some items that had been seized. Pet. App. 4. Detective Conn explained that he had understood the district court's March 15, 1996, order as requiring the return of non-contraband items only. That interpretation of the district court's order, the district court later concluded, was "consistent with th[e] [c]ourt's intention." *Ibid.*

> vation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property. The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be returned to the movant, although reasonable conditions may be imposed to protect access and use of the property in subsequent proceedings. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

Petitioners alleged that the government improperly had destroyed 14 different types of property. Pet. App. 5-13.

After holding several evidentiary hearings, the district court granted petitioners' motion in part and denied it in part. Pet. App. 1-17. With respect to numerous items, the court concluded that petitioners had failed to satisfy their burden of proving either the item's existence or its value. *Id.* at 14. "Consequently," the court ruled, "the Government does not have any obligation with respect to these items." *Ibid.* The court found, however, that petitioners had met their burden of proof with respect to the existence and value of six carts, keys, wedding and bar mitzvah invitations, and a fax machine. *Id.* at 12, 15. The court directed the government to return the one cart still in its possession and to pay $2450 to petitioners in compensation for the remaining items, which had been destroyed. *Id.* at 15-17.

The district court also rejected the government's argument that it lacked jurisdiction to award money damages under Rule 41(e). Pet. App. 15. Postconviction motions for the return of property seized in connection with criminal proceedings, the court stated, are civil equitable proceedings. *Ibid.* Citing *United States* v. *Martinson*, 809 F.2d 1364, 1368 (9th Cir. 1987), the district court held that, once a party has invoked the court's jurisdiction by moving for the return of property, the court has jurisdiction to offer complete relief. The court stated that the government should not "be able to destroy jurisdiction by its own conduct," and that "[t]he government should not at one stroke be able to deprive the citizen of a remedy and render powerless the court that could grant the remedy." Pet. App. 15 (quoting *Martinson*, 809 F.2d at 1368). Finding that the government had destroyed the property after the court had ordered its return, the district court concluded that it had ancillary jurisdiction to award damages. *Id.* at 16. Petitioners later filed a motion to alter or amend the judgment to provide for additional damages; the district court denied the motion. *Id.* at 18.

3. Petitioners appealed, again seeking additional damages. Although the government did not appeal, it argued that petitioners were not entitled to additional compensation under Rule 41(e) because that rule does not accord district courts authority to award money damages against the government in the first place. Pet. App. 20. The Third Circuit agreed and vacated the district court's order insofar as it awarded money damages. *Ibid.*[2]

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[2] The appellate court left untouched the portion of the district court order directing the return of the cart. The court of appeals also affirmed the district court's order denying petitioners' motion

The court of appeals first observed that federal courts "do not have jurisdiction over suits against the United States unless Congress, via a statute, expressly and unequivocally waives the United States' immunity to suit." Pet. App. 23. "Moreover," the court continued, waivers of immunity "must be unequivocally expressed," and "any such waiver must be construed strictly in favor of the sovereign." *Id.* at 23-24 (citation and internal quotation marks omitted). Examining the text of Rule 41(e) in light of those principles, the court of appeals concluded that Rule 41(e) does not waive the United States' immunity with respect to claims for money damages. *Id.* at 26. Relying on the Fifth Circuit's reasoning in *Peña* v. *United States*, 157 F.3d 984, 986 (1998), the court explained that "Rule 41(e) makes no provision for monetary damages." Pet. App. 26. Instead, that rule "only provides for one express remedy—the return of property." *Ibid.* It is inappropriate for federal courts, the court continued, to "read into the statute a waiver of the federal government's immunity from [money] damages" where the text of the rule itself does not provide for such a waiver. *Ibid.* (quoting *Peña*, 157 F.3d at 986).

In cases between private parties, the court of appeals noted, the power of a court to grant equitable relief may also encompass authority to offer money damages to ensure relief is complete. Pet. App. 27. But whatever the merit of "this line of reasoning * * * in analogous situations with respect to a non-governmental entity," the court of appeals concluded that "it does not properly address" the issue of "sovereign

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to alter or amend the judgment since that motion challenged only the district court's refusal to award additional damages. Pet. App. 20.

immunity." *Ibid.* "In fact," the court continued, this Court concluded in *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255 (1999), that a "waiver of sovereign immunity does not extend beyond the express terms of the waiver," even where the relief sought is equitable in nature. *Ibid.* Similar reasoning, the court of appeals explained, applies here:

> [T]o the extent a court may read Rule 41(e) as a waiver of sovereign immunity, it must limit the waiver to the express terms of the rule. We reiterate that Rule 41(e) provides for one specific remedy—the return of property. Although courts treat a motion pursuant to Rule 41(e) as a civil equitable action, such a characterization cannot serve as the basis for subjecting the United States to all forms of equitable relief. A court must strictly construe the scope of a waiver of sovereign immunity in favor of the sovereign.

Pet. App. 28.

The court of appeals noted that, although the district court had erred, earlier case law had given that court "reason to believe" that Rule 41(e) permits district courts "power to award damages incident to the complaint." Pet. App. 20, 24 (citation omitted). The court of appeals rejected that theory, however, because it ignores the effect of sovereign immunity and the limited nature of the relief authorized by Rule 41(e). *Id.* at 26.

The Third Circuit also rejected the concern, expressed by the Ninth Circuit in *Martinson*, *supra*, and adopted by the district court in the opinion below, that the government should not be allowed to destroy property and thereby prevent a court from granting a remedy. "While we respect this policy argument," the

court stated, "it overlooks the fact that a determination of whether Rule 41(e) authorizes an award of damages raises a question not of mootness, but of jurisdiction. Moreover, application of sovereign immunity, by its very nature, will leave a person wronged by Government conduct without recourse." Pet. App. 25.[3] Accordingly, "[a]fter careful analysis," the court of appeals "reject[ed] the cases which allow an award of damages in a proceeding under Rule 41(e)," because they are inconsistent with the principle that a "Rule of Criminal Procedure that does not expressly provide for an award of monetary damages does not waive sovereign immunity." *Id.* at 26.[4]

Finally, the court observed that allowing a Rule 41(e) action for money damages could undermine the limitations set forth in the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*; 28 U.S.C. 1346(b)(1) (1994 & Supp. V 1999). The court of appeals noted that, in certain circumstances, 28 U.S.C. 2680(c) bars claims arising out of the "detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer." "[G]ranting an award of damages under Rule 41(e)," the court concluded, "could allow a party to make a recovery pursuant to a procedural rule even though he or she would be barred from such

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[3] The court also pointed out that a more recent Ninth Circuit decision, *United States* v. *Woodley*, 9 F.3d 774 (1993), "appears to be contrary to [that court's prior] reasoning in *Martinson* to the extent [*Martinson*] held that a district court has jurisdiction to award monetary damages despite the fact that Rule 41(e) does not expressly provide for such an award." Pet. App. 25.

[4] The Third Circuit also concluded that, in view of its holding, it "need not address the broader question of whether rules of procedure, standing alone, can be found to constitute a waiver of sovereign immunity." Pet. App. 26 n.4.

recovery under a statute passed by Congress. Such a result would be incongruous as it would be directly contrary to the intent of Congress." Pet. App. 30.

ARGUMENT

Petitioners contend (Pet. 1-5) that the district court had authority, in proceedings under Rule 41(e) of the Federal Rules of Criminal Procedure, to provide a monetary remedy for destroyed property. This Court recently declined review in another case raising the same issue. *Jones* v. *United States*, cert. denied, 121 S. Ct. 2195 (2001). There is no reason for a different result here.

1. Because the United States is entitled to sovereign immunity, it "may not be sued without its consent," and "the existence of consent is a prerequisite for jurisdiction." *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983). Waivers of sovereign immunity must be unequivocally expressed in statutory text, and are to be strictly construed in favor of the sovereign. *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999); *Lane* v. *Peña*, 518 U.S. 187, 192 (1996); *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992). When the government does consent to be sued, "the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction." *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986) (citing *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941)).

Applying those principles, this Court has recognized that, "[w]here a cause of action is authorized against the federal government, the available remedies are not those that are 'appropriate,' but only those for which sovereign immunity has been expressly waived." *Lane* v. *Peña*, 518 U.S. at 197 (citation omitted). See also *OPM* v. *Richmond*, 496 U.S. 414, 416, 424, 432 (1990)

(plaintiff entitled to money from the Treasury only if Congress by law expressly so directs); *Automatic Sprinkler Corp. of America* v. *Darla Envtl. Specialists*, 53 F.3d 181, 182 (7th Cir. 1995) ("The principle of governmental immunity is simple: anyone who seeks money from the Treasury needs a statute authorizing that relief."). Consequently, when an individual seeks an award of damages from the federal government, he must identify a statutorily or constitutionally recognized entitlement to money from the Treasury, and a waiver of sovereign immunity permitting him to assert that entitlement in court. See *United States* v. *Testan*, 424 U.S. 392, 400 (1976); *Mitchell*, 463 U.S. at 216-217 (even where jurisdiction exists, the plaintiff "must demonstrate" that the "source of substantive law he relies upon can fairly be interpreted as *mandating* compensation by the Federal Government for the damage sustained" (emphasis added) (citations and internal quotation marks omitted)); *FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994) (courts may not award damages against federal agency absent "a waiver of sovereign immunity" and a "source of substantive law [that] provides an avenue for relief"). See also *United States* v. *Idaho*, 508 U.S. 1, 8-9 (1993) ("The cases * * * dealing with waivers of sovereign immunity as to monetary exactions from the United States in litigation show that we have been particularly alert to require a specific waiver of sovereign immunity before the United States may be held liable for them.").

Federal Rule of Criminal Procedure 41(e) provides neither a waiver of immunity to suits for monetary compensation nor a substantive right to monetary payments from the government. Instead, Rule 41(e) authorizes only one form of relief: District courts, Rule 41(e) specifies, may order the government to "return"

specified items of property to the property's rightful owner. As the Third, Fourth, and Fifth Circuits have all recognized, federal courts are not at liberty to supplement that authorized form of relief with an additional money damages remedy. Pet. App. 28; *Peña* v. *United States*, 157 F.3d 984, 986 (5th Cir. 1998); *United States* v. *Jones*, 225 F.3d 468, 469 (4th Cir. 2000), cert. denied, 121 S. Ct. 2195 (2001). To the contrary, the "available remedies" against the government are not "those that are 'appropriate,' but only those for which sovereign immunity has been expressly waived." *Lane* v. *Peña*, 518 U.S. at 197.

2. Petitioners' attempt to distinguish this Court's decisions in *Nordic Village*, *Lane* v. *Peña*, and *Blue Fox* is unavailing. Petitioners first argue that, in *Nordic Village*, "Congress ha[d] not empowered a bankruptcy court to order a recovery of money from the United States," Pet. 2 (quoting *Nordic Village*, 503 U.S. at 39); they argue that in this case "Congress has given express rights to district courts to render payment," *ibid.* (citing 28 U.S.C. 2414). *Nordic Village*, however, rested on the fact that there was no waiver of sovereign immunity, not the absence of a cause of action against the United States. See 503 U.S. at 39 ("Neither § 106(c) nor any other provision of law establishes an unequivocal textual waiver of the Government's immunity from a bankruptcy trustee's claims for monetary relief."). Here too there is no waiver of sovereign immunity. Rule 41(e) authorizes courts to order the return of property. But it nowhere waives the government's immunity to money damages claims such as petitioners'.

In any event, petitioners' attempt to distinguish *Nordic Village* rests on the mistaken premise that 28 U.S.C. 2414 gives them a privately enforceable entitle-

ment to money from the Treasury. See Pet. 2. Section 2414, however, merely authorizes the payment of district court judgments. It presupposes that a district court, before entering a money judgment payable under Section 2414, will have found both (1) a congressionally or constitutionally recognized substantive right to money from the Treasury and (2) the waiver of immunity that is a prerequisite to jurisdiction. See *Trout* v. *Garrett*, 891 F.2d 332, 335 (D.C. Cir. 1989) (distinguishing between legislation waiving sovereign immunity such as 42 U.S.C. 2000e-5(k) and "prescriptions to facilitate payment of valid claims against the sovereign, notably, 31 U.S.C. § 1304 and 28 U.S.C. § 2414"). As this Court explained in *Republic National Bank of Miami* v. *United States*, 506 U.S. 80 (1992), 31 U.S.C. 1304 and 28 U.S.C. 2414 do not "create an all-purpose fund for judicial disbursement. . . . Rather, funds may be paid out only on the basis of a judgment based on a substantive right to compensation based on the express terms of a specific statute." 506 U.S. at 95 (quoting *OPM* v. *Richmond*, 496 U.S. at 432). Here, Rule 41(e) does not give petitioners a "substantive right to compensation" for lost property, much less waive the government's immunity to suits seeking such compensation.

Respondents also attempt to distinguish *Lane* v. *Peña*, *supra*. *Lane*, they argue, was "not a case [in] which a right of action exists to enforce a federal right and Congress is silent on the question of remedies." Pet. 2-3 (quoting 518 U.S. at 197 (citation and internal quotation marks omitted)). This, however, is not such a case either. Far from creating a right of action and being silent on remedies, Rule 41(e) speaks directly to the issue of remedies by authorizing one remedy and one remedy alone—the return of the property. Because

Rule 41(e) does not authorize the further remedy of money damages, federal courts may not, consistent with *Lane* v. *Peña*, create such a remedy (and waive the government's immunity to suits seeking it) on their own.

Finally, petitioners attempt to distinguish this Court's decision in *Blue Fox*, *supra*. In *Blue Fox*, this Court held that a plaintiff could not bring an "equitable lien" claim under the waiver of immunity provided by the Administrative Procedure Act (APA), 5 U.S.C. 702. See 525 U.S. at 257. The APA waives the government's immunity with respect to claims for judicial review of agency action, but excepts from the waiver (among other things) suits seeking "money damages." 5 U.S.C. 702. Money damages, this Court has explained, is money given as "compensation for an injury to [the claimant's] person, property, or reputation," or as a "substitute" for a legal duty the government allegedly breached. *Bowen* v. *Massachusetts*, 487 U.S. 879, 893, 895 (1988). In *Blue Fox*, the Court rejected the claim that federal courts could order monetary relief under the APA's waiver of immunity whenever such relief could be characterized as "equitable." 525 U.S. at 262 ("[T]he equitable nature of the" relief sought "does not mean that its ultimate claim was not one for 'money damages.'"). Instead, the Court explained, the "crucial question" under the APA is whether the remedy sought is one for which Congress has waived immunity or an award of "money damages" for which Congress specifically chose to withhold waiver. *Id.* at 261. Similarly here, the crucial question under Rule 41(e) is whether the relief that petitioners seek is the "return of the property" authorized by that Rule, or some other form of relief, which Congress has not authorized and

for which Congress has not waived the government's immunity.

Petitioners further assert that *Blue Fox* is distinguishable because, in that case, the plaintiff sought the "substituted relief of a lien" in an action where money was to be "the end all-be all of" the suit. Pet. 3. Petitioners assert that, unlike the plaintiff in *Blue Fox*, they would rather have their property back. *Ibid.* Even if that were true, the only question in this case is whether a district court can order the payment of money damages under Rule 41(e) as compensation where property cannot be returned, *i.e.*, as a substitute for the property that petitioners cannot recover. Petitioners concede as much in their question presented, which asks whether district courts have "civil equitable powers * * * to compensate an individual for destroyed property." Pet. i. Because Rule 41(e) does not by its terms authorize such compensatory awards, and certainly does not waive the government's immunity to them, petitioners' damages claim was properly rejected.[5]

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[5] Petitioners also assert that their property still exists; that the only testimony supporting destruction was from a witness who was a "stipulated perjurer"; and that the only evidence of destruction was a document "stipulated to be false." Pet. 3. Petitioners further claim that the prosecutor had suborned perjured testimony because nobody knew where the property was. *Ibid.* See also Pet. 4. That factbound claim does not warrant further review. Although there was a disagreement between two government witnesses concerning whether the FBI case agent authorized, participated in, or was aware of, the April 1996 destruction of some of petitioners' property, see C.A. App. 29-30, 66-76, 147-152, the district court made no finding of perjury. Rather, the court found that petitioners had failed to establish the existence of numerous items for which they sought compensation and that many of their

3. Petitioners also argue that, unlike the Third and Fifth Circuits, the Second, Fourth, and Ninth Circuits permit damages to be awarded under Rule 41(e). Pet. 2 (citing *United States* v. *Martinson*, 809 F.2d 1364 (9th Cir. 1987); *Mora* v. *United States*, 955 F.2d 156 (2d Cir. 1992); *United States* v. *Kanasco, Ltd.*, 123 F.3d 209 (4th Cir. 1997)). That claimed division in the circuits does not warrant this Court's review.

As an initial matter, petitioners are incorrect to claim that the Fourth Circuit permits money damages to be awarded under Rule 41(e). In *United States* v. *Jones*, 225 F.3d 468 (2000), cert. denied, 121 S. Ct. 2195 (2001), the Fourth Circuit held that Rule 41(e) does *not* authorize federal courts to award damages against the United States:

> Rule 41(e) does not contain a waiver of sovereign immunity. We therefore agree with the Third and Fifth Circuits that courts lack jurisdiction to award damages under Rule 41(e).

225 F.3d at 470 (citation omitted). In so holding, the Fourth Circuit distinguished *Kanasco*, *supra*, the case on which petitioners rely, on the ground that *Kanasco* did not directly address the issue of sovereign immunity. "Because *Kanasco* did not address the effect of sovereign immunity on the legal jurisdiction of the courts in the Rule 41(e) context," the *Jones* decision explained, the court was "free to address the issue" in *Jones*. 225 F.3d at 469.

The remaining cases petitioners cite as contrary authority are distinguishable for the same reason. Like *Kanasco*, they do not squarely address whether Rule

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allegations lacked credibility. See Pet. App. 5-13 (Findings of Fact 35, 43, 49, 71, 75, 80, 84, 89, 91, 94, 99, 109).

41(e) creates a substantive entitlement to money from the Treasury and provides a waiver of immunity permitting that entitlement to be asserted in court.[6] As a result, those cases do not bind the courts of appeals to any particular outcome in cases in which those issues are raised. See *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 119 (1984) ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.") (citation omitted). The Fourth Circuit concluded that it was not bound by its own earlier decision in *Kanasco* for that reason; the Third Circuit in this case distinguished its prior rulings in this area on similar grounds, Pet. App. 30-31; and the Ninth Circuit has issued a decision suggesting that it would be inclined to do likewise, *id.* at 25-26.[7] There is

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[6] The same is also true of cases such as *United States* v. *Solis*, 108 F.3d 722, 723 (7th Cir. 1997) (dictum); *United States* v. *Sanders*, 48 F.3d 1233 (10th Cir. 1995) (Table); *United States* v. *Rotzinger*, 47 F.3d 1174 (7th Cir. 1995) (Table); *Thompson* v. *Covington*, 47 F.3d 974 (8th Cir. 1995).

[7] As the court of appeals explained (Pet. App. 25-26), the Ninth Circuit has already issued one decision suggesting that *Martinson* should not be read as resolving the sovereign immunity issue. In *United States* v. *Woodley*, 9 F.3d 774, 781-782 (9th Cir. 1993), the Ninth Circuit held that Federal Rule of Criminal Procedure 16(d)(2), which authorizes courts to "prescribe such terms and conditions as are just" to remedy violations of discovery orders, does not authorize the imposition of a monetary remedy against the government. If the broader grant of authority to "prescribe such terms and conditions as are just" does not authorize federal courts to award money damages against the government, it follows *a fortiori* that the narrow authority to order the return of property in Rule 41(e) does not either. Pet. App. 26.

no reason to believe that the other courts of appeals will not reach similar conclusions.

In any event, even if some of the earlier court of appeals decisions upon which petitioners rely could be read as addressing the issue of sovereign immunity, cf. *Martinson*, 809 F.2d at 1368 n.2, those decisions predate this Court's decisions in *Lane* v. *Peña* or *Blue Fox*, *supra*. *Lane* v. *Peña* makes it clear that, when Congress waives immunity with respect to a cause of action, the only available remedies are those for which sovereign immunity has been expressly waived. *Lane* v. *Peña*, 518 U.S. at 197. Here, Rule 41(e) permits only one form of relief—return of the property—and nowhere contemplates damages awards. Moreover, while courts of appeals at one time might have assumed that they could award damages against the government as an "incident" to a Rule 41(e) proceeding without a waiver of immunity because the action is "equitable," *Blue Fox* makes it clear that such an assumption is incorrect. Even if the proceeding or cause of action is considered "equitable," courts are prohibited from awarding money damages against the government in the absence of an unambiguous statute waiving the government's immunity. *Blue Fox*, 525 U.S. at 261, 262. See also pp. 5-7, 12-13, *supra*. In light of those decisions, Rule 41(e)'s mandate for return of property cannot be read as waiving the government's immunity with respect to, and according claimants a substantive right to, monetary compensation from the government.

4. Finally, petitioners argue that, even if there is no waiver of sovereign immunity, "equity would still demand a return of some of the monies ordered forfeit by the District Court." Pet. 3. In particular, petitioners rely heavily on the fact that they were ordered to forfeit money as part of their criminal sentences.

Because the government could have attached petitioners' property had petitioners not paid their $150,000 forfeiture, petitioners contend that "the converse" right — *i.e.*, the right of petitioners to attach the money in the Treasury based on the government's inability to return otherwise returnable property—"must equitably exist." Pet. 4.

That case-specific contention does not warrant review. As an initial matter, neither the court of appeals nor the district court addressed petitioners' argument that they were entitled to offset their damages, retroactively, against the already completed criminal forfeiture. This Court ordinarily does "not decide in the first instance issues not decided below." *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999). Petitioners, moreover, were subject to lawful criminal forfeitures under 18 U.S.C. 982(a)(1), 982(b)(1)(a) and 1956(h).[8] They cite no authority for the proposition that convicted offenders may set off debts

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[8] Section 982(a)(1) provides in pertinent part that "[t]he court, in imposing sentence on a person convicted of an offense in violation of section 5313(a), 5316, or 5324 of title 31, or of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property." Petitioners pleaded guilty to violating 18 U.S.C. 1956(h). C.A. App. 411-414. As this Court explained in *United States* v. *Bajakajian*, 524 U.S. 321, 332 (1998), Section 982(a)(1)

> descends not from historic *in rem* forfeitures of guilty property, but from a different historical tradition: that of *in personam*, criminal forfeitures. Such forfeitures have historically been treated as punitive, being part of the punishment imposed for felonies and treason in the Middle Ages and at common law. See W. McKechnie, Magna Carta 337-339 (2d ed. 1958); 2 F. Pollock & F. Maitland, The History of English Law 460-466 (2d ed. 1909).

allegedly owed to them by the government against a forfeiture penalty entered against them in a criminal case.

In any event, because petitioners' forfeiture was lawful, and because the forfeited sums were paid into the United States Treasury, sovereign immunity precludes petitioners' effort to treat the forfeited money as an available "fund" from which they can recover compensation. It is well established that "sovereign immunity bars creditors from attaching or garnishing funds in the Treasury, see *Buchanan* v. *Alexander*, 4 How. 20 (1845), or enforcing liens against property owned by the United States, see *United States* v. *Ansonia Brass & Copper Co.*, 218 U.S. 452, 471 (1910) * * *." *Blue Fox*, 525 U.S. at 264. Nothing in Rule 41(e) suggests that Congress intended to alter that settled principle where, as here, a party does not seek recovery of his own property from the government, but instead seeks money from the Treasury as compensation for a suffered loss.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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